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In the Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

PARKER STENNICK, Trustee in Bankruptcy for the Hamilton Creek Timber Company, a Corporation, and the Rainier Lumber & Shingle Company, a Corporation,

Plaintiff-Appellant,

vs.

WILLARD N. JONES, FRED A. KRIBS and the J. K. Lumber Company, a Corporation,

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APPELLEES' BRIEF.

Appeal from the Decree of the District Court of the United States for the District of Oregon on Accounting.

GUY C. H. CORLISS,
Attorney for Appellees.

PIONEER PRINTING & STAT'Y CO., PORTLAND

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Appellees object to a retrial of the merits of this case by this court on this appeal, in view of the nature of the record before the court. As this court well knows, this case has a history. Upon the former appeal it was sent back to the District Court for an accounting. Upon this accounting some additional evidence was taken before his Honor, Judge Bean. Judge Bean ruled that all of the other evidence which had been previously taken in the case was before him for consideration on

the accounting, and that the whole case was as much before him as though he had himself, on his own motion, opened up the case for an accounting after final decree had been entered. The evidence taken upon the original hearing in the District Court consisted of two classes:

One class comprised oral testimony given by witnesses in court and certain exhibits offered in evidence. The other class, and by far the largest portion of the evidence, consisted of portions of the testimony taken on the trial between the same parties in a suit in the Circuit Court of Multnomah County, Oregon, which portions of such evidence were stipulated into the case on the trial of this case before Judge Bean. This evidence was stipulated into the record out of five large volumes of evidence containing over 3000 pages.

When this case came to this court the first time a statement was properly settled under Equity Rule 75, embodying the substance of the evidence, so far as it appeared to be pertinent to the questions which had been litigated in the court below.

The decision of this court on the first appeal has raised questions necessitating a settlement of a statement under Equity Rule 75 on this appeal to the end that appellees may protect themselves in this court. Portions of the evidence stipulated into the record from the evidence taken in the State Court have become vital on this appeal because they shed light upon the credibility of the witnesses who

testified on the accounting, and because such evidence on the accounting is unintelligible without the aid of the additional evidence so stipulated into the case. If there ever was a case when a litigant was entitled to the protection of Equity Rule 75, it is the case at bar. Moreover, Judge Bean and Judge Bean alone has, under this rule, the absolute right to determine in the settlement of the statement what evidence is necessary to be embodied in such statement. He has the right to have the case heard in this court upon an orderly and full statement settled by him in the usual way and not upon a garbled record.

Counsel for appellants has no excuse for failure to settle a statement in the usual way. On the 14th of April, 1921, I addressed to him a letter in answer to his request to proceed independently of the rule, and in this letter I definitely notified him what my attitude was in the following language:

> "Moreover, I think that the condensed statement gave the Circuit Court of Appeals a wrong impression about the case, and that upon a full statement of the whole record the decree would have been affirmed absolutely. I shall contend in this case that upon the whole record Jones and Kribs are not liable for two reasons:
>
> "First, that there is no liability on them personally, even assuming that the J. K. Lumber Company was liable for something; and second, that upon the whole record you have

failed to maintain the burden of proof showing any sum for which there is any accountability. Of course, Jones and Kribs cannot appeal, as they have been successful, and they therefore have the right upon your appeal to contest their liability upon every ground. I shall therefore insist that this time the complete record be prepared in accordance with Equity Rule 75.

"From the express language of this rule, the duty of condensing and stating the evidence rests primarily upon you. Unless the proposed statement is in substance complete, I shall of course insist under the provisions of this rule that it be made complete before it is approved by Judge Bean. This is a matter that the Circuit Court of Appeals has no jurisdiction over. They may allow you to dispense with a printed abstract, but they have no control over the settlement of the record in the District Court. It would be very unfair to the respondents to dispense with the printing of the record, for in that event I would have nothing to guide me in preparing my brief, as the original record would be in San Francisco."

Despite this notice, no proposed statement has ever been filed; and indeed not a single step has been taken by counsel to comply with any of the requirements of Equity Rule 75. In fact, I have only the information given me by the clerk of the court below to shed any light on the question how this case came to be certified to this court without

Equity Rule 75 being complied with. He informed me that some order had been made by his Honor Judge Gilbert, but I have never seen a copy of the order; it has never been served upon me, and I never had any notice of the application for the making of such order. In this connection I respectfully contend that no judge has any authority to settle any statement except the judge who tried the case, and that no judge or court has any power to dispense with the requirements of Equity Rule 75. This rule has all the force of a statute. The only court having any jurisdiction to dispense with its requirements is the United States Supreme Court, the court which prescribed this rule under authority of an act of Congress.

In 15 Corpus Juris 913 the doctrine is thus stated:

> "When the rules of a court are prescribed by a higher court under a statute, the court for which such rules are prescribed has no authority to modify or suspend the same."

To same effect are:

Poultney vs. LaFayette, 12 Pet. 472.
Gaines vs. Relf, 15 Pet. 16.
Rio Grande & Co. vs. Gildersleeve, 174 U. S. 603-608-609.
15 Corpus Juris, 904.
U. S. vs. Motion Picture Patents Co., 230 Fed. 541.
Rodgers vs. United States, 152 Fed. 426.

The case of U. S. vs. Motion Picture Patents Co., 230 Fed. 541, was decided under Rule 75. In this case the court said:

> "The appellant and this court can be relieved of the obligation of Rule 75 only by the Supreme Court."

In Rio Grande & Co. vs. Gildersleeve, 174 U. S. 608, the court said:

> "But the rule once made without any such qualification must be applied to all cases which come within it, until it is repealed by the authority which made it."

Having no printed record or copy of statement to refer to, all I can submit on the question whether plaintiff is entitled to recover anything, even of the J. K. Lumber Company is the following brief I submitted in the District Court:

"Before discussing the case let us first of all determine the state of the record.

1. A large amount of the testimony and some exhibits were stipulated into the record, being the testimony taken in the State Court in the former action brought by plaintiff against defendants. This consists of five books, which will be delivered to the court with this brief.

2. The evidence taken in this case upon the original trial and before it was taken to the Circuit Court of Appeals.

3. The additional evidence taken on the accounting ordered by the Circuit Court of Appeals.

Throughout this brief we will refer to Dodge and his corporations as "Dodge."

The opinion entirely excludes from the accounting four classes of property: (1) The railroad. (2) The railroad equipment. (3) The logging equipment. (4) All personal property bought with with $215,000.00.

The sole item for which the J. K. Lumber Company is accountable is the personal property taken by the J. K. Lumber Company and not bought with the $215,000.00.

The burden of proof is, both under the law and under the opinion of the Circuit Court of Appeals, upon the plaintiff to establish by legal evidence that the J. K. Lumber Company took some property not bought with the $215,000.00; and in addition the plaintiff must show its value at the time it was taken. Even this, however, would not entitle plaintiff to recover, because it is significant that the Circuit Court of Appeals did not decree that judgment for the value of such property should be rendered by this court, **but only that such decree should be rendered upon the accounting as should be just and equitable.**

The following large items are excluded from this accounting for the reasons hereinafter specified:

1. The Shea locomotive. This had been bought on a conditional sale and only a small payment made on it; and when the J. K. Lumber Company took possession they found this Shea locomotive in the possession of the vendor and the company was unable to exercise any control over this engine and did not exercise any such control by virtue of the forfeiture clause, but entirely by making a new arrangement with the vendor that held the title.

2. The logging trucks were of course a part of the railroad equipment. They were an indispensable instrumentality in transporting the logs from the railroad to the river.

3. The boomsticks were also a part of the logging equipment, according to the undisputed evidence in the case. (Tr. Ev. this case, Oct. 18, 1920, page 55-101.)

Moreover, the evidence indicates that the boomsticks were a part of the Yale logging equipment and this equipment was paid for out of the $215,000.00. (Tr. Ev. this case, Oct. 18, 1920, pages 39-40-101.)

The Bagley scraper: The evidence of Mr. Cox is positive that there was no such scraper on the property. This is worth tons of the testimony of a witness like Babcock. (Tr. Ev. this court, 116.)

The steam drag saw, which is called a steam pond saw by the plaintiff, was in the same shape as the Shea engine. It had not been paid for and was shipped back. (Tr. Ev. this court, 115.)

The jacks were undoubtedly a part of the logging railroad equipment. (Tr. Ev. this court, 116-117.) There is no other position in the category in which the jacks can be put. They were there for use in connection with the logging operations and were a very important factor in the repair of the engine.

The oil tank car was of course a part of the railroad equipment.

The donkey engines were of course a part of the logging equipment; and this is true of the wire cable. In fact, it is impossible to conceive what any of this property was up there for except as a railroad or railroad equipment or logging equipment, unless of course we except the tools and commissary supplies.

In this connection we call the court's attention to the plaintiff's complaint as found at pages 8 to 10 of transcript of record on appeal to the Circuit Court of Appeals. In Paragraph V the plaintiff has listed all of the property that he has ever made any claim for, and this includes tools, commissary stock and messhouse equipment. Then in the next paragraph plaintiff alleges that the railroad was built upon the land of the J. K. Lumber Company under the contract in question, and then the allegation continues as follows:

> "And the other structures and improvements set forth in the preceding paragraph were also built in good faith upon the said

defendants' lands and in accordance with the said contract marked Exhibit 'A.' "

This property was up there for the sole purpose of enabling Lodge to carry out his stumpage contract and was being used as a mere adjunct to the construction of the railroad, which at the time he took possession had not yet been finished. I have always felt that this court was right in saying that it was within the spirit of the forfeiture clause, no matter whether it was bought with the $215,000.00 or not. But the Circuit Court of Appeals has held that if the plaintiff can prove that any of this personal property not railroad equipment and not logging equipment was not bought with the $215,-000.00, then the J. K. Lumber Company is accountable for its value at the time it was taken, provided, however, that this court shall render only such decree as shall be just and equitable under all the circumstances.

This brings us to the question whether plaintiff has maintained the burden of proof and shown with respect to a single item of property of this class: (1) That it was not bought with the $215,000.00. (2) That it was on the property when the J. K. Lumber Company took possession under the forfeiture clause. (3) Its value at that time.

We assert that the plaintiff has failed in establishing a single one of these necessary elements of his case.

We wish first of all to answer the absurd contention of counsel that because in some, or perhaps a good many instances, Dodge embezzled the money of the J. K. Lumber Company derived from the sale of its bonds and turned over to him on the strength of his vouchers as expenditures made or to be made, the property to that extent was not bought with the $215,000.00. The Circuit Court of Appeals has held that this money was our money and that Dodge in buying this property for development was doing so as our agent. If the money had been applied in each case to pay for the articles specified in the vouchers, counsel for plaintiff would not of course make this point. What he asks this court to do is to sanctify the embezzlement by Dodge of our money and enable Dodge to build up legal rights upon the basis of such embezzlement.

We must not lose sight of the fact that this is a case where the trustee in bankruptcy stands squarely in the shoes of Dodge. It is not one of those exceptional cases—as for instance the case of a fraudulent or preferential transfer where the trustee has a right superior to that of the bankrupt. On the plainest principles of justice as between Dodge and the J. K. Lumber Company each asserting a right to this property, Dodge is estopped to claim that he diverted the money from the purpose for which it was turned over to him. Whether he ever paid for the property at all and whether he used a dollar of our money to pay for it is wholly immaterial.

The procedure employed in getting the money from the hands of the trustee for the bondholders in Chicago into the hands of Dodge in Portland was for Dodge to present to the J. K. Lumber Company vouchers of expenditures made or to be made. These were reported in summary form to the trustee, the money sent by him to the J. K. Lumber Company and then turned over to Dodge. The J. K. Lumber Company voluntarily turned over to counsel for plaintiff all of these vouchers it was able to find. They total about $147,000.00. It is, however, only fair to state that two large payments were made without any vouchers being presented by Dodge to the J. K. Lumber Company, to-wit: $23,000.00 for the purchase of steel rails, and later $10,000.00 for the purchase of steel rails from Brady & Company. Adding this item of $33,000.00 to $147,000.00 makes the total vouchers before this court, $180,000.00. It follows that there are vouchers to the extent of $35,000.00 missing. See also the following evidence on this feature of the case: (Tr. Ev. this case, Oct. 18, 1920, pages 101-102-133-134. Evidence of F. A. Kribs, pages 3 to 5. See also the footings of the vouchers themselves.)

It appears from the testimony that when Mr. Jones and Mr. Kribs were in the suit in the State Court this plaintiff by a subpoena duces tecum had a great mass of papers of the J. K. Lumber Company brought into court, and the evidence of Jones and Kribs is that when the papers that were not put in evidence in that case were returned, in

some way a large number of these vouchers had disappeared. This condition has been brought about by the act of the plaintiff himself, not of course intentionally. (Ev. of Kribs, 4-5.) We have a case, therefore, where the well-settled rule of law relating to actions of account is applicable. That rule is correctly stated in Vol. 1, Corpus Juris, 628.

It is perfectly clear that it is impossible for this court to pick out any piece of personal property and say with respect to it under the evidence in this case that this property was taken by the J. K. Lumber Company and was not paid for out of the $215,000.00.

Repeatedly during the taking of testimony the court stated that the only means of determining what personal property was on the ground when the J. K. Lumber Company took possession was by an inventory taken at the time, and then by competent evidence showing the value of the different articles. This, of course, would only be a step in the making out of a case, as it would still be necessary to show what articles of personal property so identified and valued were not paid for out of the $215,000.00.

This then brings us to the question of the inventories. Mr. Babcock has testified that he did not take an inventory with Mr. Lilly, but took an inventory of his own sometime before. When, however, he was confronted with Mr. Lilly's testimony to the effect that the inventory was taken at the time by the two jointly, Mr. Babcock had his

memory refreshed and accepted Mr. Lilly's statement as true. Mr. Lilly was not examined before this court, but was a witness in the State Court, and his evidence in the State Court was upon the original trial of this case made a part of the record in this case. His evidence is found at pages 2408 to 2414 of transcript of evidence in the State Court and is in substance as follows:

At the time the J. K. Lumber Company took possession an inventory of all of the property was made by himself and Babcock, he (Lilly) calling off the property and Babcock setting it down in a book. He further testified that the inventory which he identified as Exhibit 73 in the State Court was a copy made by himself from the inventory as it was set down in the book by Babcock. This Exhibit 73 is a part of the record in this case and does not contain a single item of valuation.

Mr. Babcock thought he at some time set down values in this book; but it is a remarkable fact that this book has never been produced by the plaintiff, either on the trial in the State Court or on this trial, although Mr. Lilly testified that it was delivered back to Babcock, who was in the employ of Dodge after he (Lilly) had made the copy—Exhibit 73.

Counsel for plaintiff undoubtedly believing his statement to be true asserted on this hearing that this original inventory was introduced in evidence in the State Court, and I promptly denied the statement because I know it is not true. (Tr. Ev. this court, Oct. 18, 1921, pages 90-91.)

A reference to the record in the State Court, which has been made a part of the record in this case, will show that while this original inventory was called for by the defendants in the State Court, it was never produced by the plaintiff. (Tr. Ev. State Court, 2412.) We challenge counsel to produce it.

Indeed Mr. Babcock testified in the State Court that the only two inventories he had were the inventory relating to the Yale logging equipment and the inventory relating to the commissary supplies, etc. (Tr. Ev. State Court, 1857-1858-1873 to 1875.)

Even if Babcock took an inventory sometime before the J. K. Lumber Company took possession, this would not shed light upon the property there when the company took possession; and, furthermore, no such inventory is in evidence before the court and no one knows what it contains. But the undoubted fact is that Babcock in this respect was drawing on his imagination, as he did repeatedly in his testimony, showing a reckless indifference to the truth, and that the inventory with which he had something to do was the inventory which Lendholm took in January, 1914, and which he admits he had something to do with. (Tr. Ev. State Court, 1857-1858.) (Tr. Ev. this court, Oct. 18, 1920, pages 92-93.)

This Lendholm inventory is entirely worthless. It contains no items with values, but only lump

sums of money; does not show what property was there in May, 1914, and does not enable us to pick out the items of the only class of personal property for which the J. K. Lumber Company is accountable and enables the court to say whether these particular items were or were not bought with the $215,000.00.

This Lendholm inventory made in January contains a large amount of wire cable that was returned afterwards before the J. K. Lumber Company took possession. And yet Mr. Babcock had the nerve to testify that all of the property in the Lendholm inventory was up there when we took possession. Mr. Babcock intended the court to believe that he was very positive on this subject. He testified at page 93, Tr. Ev. on the accounting, as follows:

> "Q. Is there any item at all in that inventory, Mr. Babcock, that was not there on the 12th of May, 1914, which you can see—speaking about Mr. Lendholm's inventory?
>
> "A. No, sir, (looking the items over) **every one of them I would say very strongly and positively were on the ground at that time.**"

And yet on re-cross-examination he had to admit that a large amount of the wire rope that was in the Lendholm inventory was not there when we took possession. (Tr. Ev. this court, 94-95.)

Babcock was also positive about the Bagley scraper, and the witness Hugh L. Cox said it was not there at all.

This is a case where the defendant is in possession of the books and accounts and data, but where on the contrary, all of these things are or should be in the possession of the plaintiff. All we know is that we took possession of certain property and the court has a list of it in the copy of the inventory made from the book in which Babcock set down the items when he and Lilly made an inventory together. Whatever is uncertain in this case is uncertain because the plaintiff, who should be in possession of all this necessary data, has failed to furnish it.

There are only two inventories that shed any light on this case, to-wit: the inventory of the Yale logging equipment received in evidence in the State Court as Exhibit 52, and the inventory of the commissary supplies received in evidence in the State Court as Exhibit 53, and a copy of it appears to be found in the transcript of record on appeal to the Circuit Court of Appeals at pages 270 to 279.

We may dismiss the inventory of the Yale logging equipment for the following reasons: First, this property was paid for out of the $215,000.00; second, it is a part of the logging equipment and therefore within the forfeiture clause.

So far as the other inventory is concerned, we call attention to the fact that there is not the slight-

est evidence to show when any of this property was purchased or that it was not bought out of the $215,000.00. From the very nature of the property a large amount of it must have been on hand for some time before the J. K. Lumber Company took possession.

Furthermore, there is nothing in the evidence to show when this inventory was taken. There is only the testimony of Babcock on the trial in the State Court that it was taken by the storekeeper, Mr. Will. (Tr. Ev. State Court, 1873-74-75.)

Moreover, there is a date on part of this inventory, to-wit: the warehouse inventory, and the date is March 20, 1914. (See Tr. Record C. C. A. 277.)

It is a fair inference that this is the date of all of this inventory; and indeed Babcock in his evidence testifies that these two accounts—the commissary account and the warehouse account—were closed together. At pages 1874-75 Tr. Ev. State Court, we find the following:

"Q. Did you find an inventory of commissary stock?

"A. Yes, I have that here.

"Q. That is the one that was made by Mr. Will?

"A. Yes.

"Q. What is this?

"A. We had two accounts; the warehouse account, and the store account, and they were both closed together as the commissary supply."

But we are wasting our time on points that are perfectly clear. The case is wholly destitute of any evidence that would warrant any recovery.

Moreover, the evidence shows an overwhelming equity in favor of the J. K. Lumber Company that was not adverted to by the Circuit Court of Appeals, to-wit: the loss on the $750,000.00 of bonds that were sold at 91 cents, representing a dead loss to the J. K. Lumber Company of $67,500.00. Laying all other equities aside, this is sufficient to defeat any recovery, even if plaintiff had succeeded in establishing a small financial liability on the theory outlined by the Circuit Court of Appeals. It was on the strength of the Dodge contract and that it would be carried out that the J. K. Lumber Company was willing to face this loss of $67,500.00 on the sale of the bonds, expecting to make it up out of the profits on the contract. Through the breach of the contract by Dodge these profits are lost. If this does not establish an equity within the meaning of the opinion of the Circuit Court of Appeals, we are at a loss to know what would establish such an equity."

By inserting this copy of my brief in the District Court I do not intend to waive my claim that the court cannot go into the merits.

Inasmuch as Jones and Kribs could not appeal from the decision which was in their favor they would of course have the right to insist in this court if the merits of the case were properly before it, that the appellant is not entitled to recover on the ground that appellant has failed to establish any liability at all as well as on the ground that the only defendant that is liable is the J. K. Lumber Company.

With respect to the personal liability of Jones and Kribs, the case is very simple. It is significant that this Court said that they would be liable for only such property as they took in their "**individual capacities,**" and not that they would be liable precisely the same as the J. K. Lumber Company would be liable.

It is necessary at this point to make an important distinction. If this were an action at law for conversion and it appeared that Jones and Kribs, acting as officers of the J. K. Lumber Company, had converted the plaintiff's personal property, they would undoubtedly be liable the same as the corporation, on the familiar principle that an agent cannot protect himself when he commits a tort by invoking the command of his principal. But this is an action for an accounting and proceeds exclusively on the theory of an enrichment of the estate of the defendant at the expense of the plaintiff. A case very much in point is Schall v. Camors, 251 U. S. 239. In that case certain bills of exchange

had been sold and in connection with the sale fraudulent representations had been made, for which the two partners of the firm were responsible, it appearing that they were cognizant of these fraudulent representations. The question was whether this claim for moneys obtained by this fraud could be proven not only against the bankrupt estate of the partnership, but also against the bankrupt estate of each of the individual partners. The court in a unanimous opinion held that the claim could not be proven against the individual partners, using the following language, at page 254, which is very pertinent to the case at bar:

> "It is insisted by petitioners, further, that because the proofs of the individual claims establish the responsibility of each partner for the frauds, they are liable in solido not only as partners, but individually; and that, irrespective of whether the claims are provable in tort for the fraud, they are provable and were properly proved both against the individual partners and against the firm as claims **in quasi contract or equitable debt.** But as the basis of a liability of this character is **the unjust enrichment of the debtor,** and as the facts show that no benefit accrued to the **individuals** as a result of the frauds beyond that which accrued to the firm, the logical result of the argument is that out of **one enrichment there may arise three separate and independent indebtednesses.**" * *

The evidence of Jones and Kribs is undisputed and conclusive that whatever they did was done by them on behalf of the J. K. Lumber Company and as officers of that company. There was not the slightest reason why they should do anything as individuals, because the only right which they could assert to the property was the right which they, as officers of the J. K. Lumber Company, could assert on behalf of that company, because of the contract in question under the forfeiture clause therein. They did not claim to have any contract with Mr. Dodge to take any of his property as individuals, and it is nonsense for anyone to pretend that such an element can be found in this case. It likewise appears undisputed that they have never derived a penny's benefit from any of this property, not even as stockholders, but that on the contrary, they have lost several hundred thousand dollars because of Dodge's breach of his contract.

For the evidence that Jones and Kribs had nothing to do with this property in their individual capacities and never derived any benefit from it, see Tr. Ev. District court, October 18, 1920, pages 129 and 130, and evidence in this court taken before the appeal, pages 2-3-51 to 53-85. See also evidence of Fred A. Kribs, pages 1 to 2, and evidence of witness Hugh L. Cox taken on this accounting, pages 108 and 109. This is not controverted by counsel for appellants. He seeks to place their liability on another ground.

Counsel's theory of the liability of Jones and Kribs is set forth in paragraph XV of the third cause of suit, as follow:

> "That the said J. K. Lumber Company was incorporated by the defendants, Willard N. Jones and the said Fred A. Kribs, and is owned by them exclusively for their own benefit and convenience, and all property held by the said J. K. Lumber Company and transferred to it, including the aforesaid property of the bankrupts, is held by the said corporation for the exclusive use and benefit of the said Willard N. Jones and the said Fred A. Kribs, and all property held, owned or controlled by the said J. K. Lumber Company is held for the exclusive profit and advantage of the said Willard N. Jones and the said Fred A. Kribs." Tr. Rec. Former Appeal, p. 32.

This is, of course, wholly inconsistent with any idea of a tort committed by them individually. It does not base their liability upon anything done by them as officers of the J. K. Lumber Company, but upon the ground that indirectly they would benefit as stockholders by anything that would enrich the estate of the J. K. Lumber Company. We, of course, must dismiss the first two causes of suit, for they both proceed upon the untenable theory that the bankrupts made a preferential transfer to the J. K. Lumber Company. The only cause of suit that has any significance is the third one, and this is based

not upon any tort, but upon the ground that the bankrupts, in fraud of their creditors, consented to the taking possession of certain property under the forfeiture clause. The bankrupts themselves would have no right of action against anyone, they having voluntarily surrendered the possession of the property.

It is to be noted that the prayer for relief in the third cause of suit is for an accounting of the value of the property taken, with the consent of the bankrupts. So far as Jones and Kribs are concerned, no equity for an accounting has been established by the evidence, for it is undisputed that the surrender by the bankrupts was made under a claim made by the J. K. Lumber Company that under the forfeiture clause in the contract, it had the right to the possession of all of this property, and this claim was recognized without protest by the bankrupts. No claim to the property was ever made by either Jones or Kribs. No equity for an accounting against Jones and Kribs having been established, the Federal Court would have no right to retain the case for the purpose of rendering a judgment against them for damages, as in an action at law for tort of conversion. They would have the constitutional right to have this strictly legal action tried before a jury.

Dowell vs. Mitchell, 105 S. W. 430.
Russel vs. Haynes, 130 Fed. 90.
Wheelock vs. Lee, 74 N. Y. 495.
Hawes vs. Dobbs, 33 N. E. 560.
Ming Yue vs. Coos Bay, Etc., Co., 24 Or. 392.

Kramer vs. Cohn, 119 U. S. 355.

No decision by any Court can be found laying down the rule that in a plenary suit in equity brought by a trustee in bankruptcy attacking a voluntary surrender of property by the bankrupt, that the officers and stockholders of the corporation, to which the surrender is made, are all jointly liable to account for property from which they have derived no benefit and which was turned over for the benefit of the corporation, and upon its claim of a right to such property.

No decree should have been rendered against the J. K. Lumber Co. for any amount. But no appeal having been taken by that defendant, that part of the decree will have to stand.

The whole decree should be affirmed.

GUY C. H. CORLISS,
Attorney for Appellees.